Yeoh Theam Poh & Anor v Bench Win Sdn Bhd & Anor and other suits

HIGH COURT (PULAU PINANG) — CIVIL SUIT NOS 22–129 OF 2006, 22–130 OF 2006 AND 22–131 OF 2006
CHEW SOO HO JC
13 MARCH 2012

Contract — Void contract — Consideration unlawful — Plaintiffs occupied premises on state land as squatters — Housing developer ignorant of plaintiffs' status contracted to give plaintiffs apartments if they moved out of premises — Developer terminated contract — Whether contract void and unenforceable — Whether plaintiffs' use of premises as consideration for contract unlawful — Contracts Act 1950 s 24(a)

The plaintiffs in the three suits occupied a dwelling ('the premises') built on state land. It was built by the plaintiffs' late father who was given a temporary occupation licence ('TOL') to occupy the land where the premises stood. Even after the TOL was ultimately cancelled, and until the time he died, the plaintiffs' father continued to occupy the premises without consent or approval from the state. The first defendant ('Bench Win'), a housing developer, wanted to build an access road through the land where the premises stood to gain access to a housing project it was planning to undertake. Bench Win contended that on the plaintiffs' representation that they were either 'licensees' or 'sub-tenants of the licensees' of the premises, it entered into separate agreements ('the compensation agreements') with them that in return for the plaintiffs' giving vacant possession of the premises to Bench Win the second defendant ('Archlaw Development') would give them one free and two price-discounted apartments in a housing project. The plaintiffs vacated the premises but as the housing project for which Bench Win needed the access road could not be implemented for some reason, Bench Win notified the plaintiffs that it was rescinding the compensation agreements. The plaintiffs filed the instant suits to declare that their compensation agreements with Bench Win and their sale and purchase agreements ('SPAs') with Archlaw Development were valid and subsisting. They also sought an order that the SPAs be specifically performed and that they be awarded damages and costs. Bench Win, which only later discovered that the plaintiffs were squatters, pleaded that the consideration for the compensation agreements was illegal and the contracts were void. Archlaw Development did not participate in the trial as it was wound up in a separate suit and leave to proceed with the action against Archlaw Development was not obtained.

Held, dismissing the claims with costs:

(1) The compensation agreements between the plaintiffs and Bench Win

were void and unenforceable on the ground of illegality. Since the SPAs were consideration for the compensation agreements which were void, the SPAs were thus ineffective and unenforceable. The claim against Archlaw Development also failed as leave of court had not been obtained under s 226(3) of the Companies Act 1965 to proceed with the suits against it (see para 23).

(2) The plaintiffs' use of the premises as consideration, when they were squatters who had no right in law or equity, was forbidden by s 425 of the National Land Code, an offence for illegal occupation of state land. Thus the plaintiffs' alleged consideration was unlawful under s 24(a) of the Contracts Act 1950 Contracts Act 1950 ('Act') (see para 22).

(3) The court's power to make declaratory judgments was confined to justiciable matters and the binding declarations it could make under O 15 r 16 of the Rules of the High Court 1980 were limited to legal and equitable rights but not to squatters such as the plaintiffs who had no such rights. The plaintiffs had also failed to prove their claim for damages (see para 24).

(4) The plaintiffs had executed the compensation agreements either as 'Licensee' or 'sub-tenant to the Licensee'. To assert and sign in those capacities when they did not possess a valid TOL was a clear assertion of untruth which made the representations a misrepresentation — see s 18 of the Act (see para 20).

[Bahasa Malaysia summary

Plaintif-plaintif dalam ketiga-tiga guaman telah menghuni kediaman ('premis-premis) yang dibina di atas tanah negeri. Ia telah dibina oleh arwah bapa plaintif-plaintif yang mana telah diberikan lesen menduduki sementara ('LMS') untuk menduduki tanah tersebut di mana premis-premis dibina. Meskipun selepas LMS telah dibatalkan secara muktamad, dan sehingga dia meninggal dunia, bapa plaintif-plaintif masih menduduki premis-premis tanpa kebenaran atau kelulusan kerajaan negeri. Defendan pertama ('Bench Win'), pemaju perumahan, ingin membina jalan akses melalui tanah di mana premis-premis dibina untuk mendapat akses kepada projek perumahan yang mana dirancang untuk diusahakan. Bench Win berhujah bahawa berdasarkan representasi plaintif-plantif bahawa mereka adalah sama ada 'licensees' atau 'sub-tenants of the licensees' premis-premis tersebut, ia telah memeterai perjanjian berasingan ('perjanjian pampasan') dengan mereka iaitu sebagai pulangan untuk plaintif-plaintif memberikan milikan kosong premis-premis kepada Bench Win defendan kedua ('Archlaw Development') akan memberi mereka sebuah pangsapuri percuma dan dua buah pangsapuri yang telah didiskaun dalam projek perumahan tersebut. Plaintif-plaintif telah mengosongkan premis-premis tetapi memandangkan projek perumahan di mana Bench Win memerlukan jalan akses tidak dapat diteruskan untuk

sebab-sebab tertentu, Bench Win telah memberitahu plaintif-plaintif bahawa ia telah membatalkan perjanjian pampasan tersebut. Plaintif-plaintif telah memfailkan guaman-guaman ini untuk mendeklarasikan bahawa perjanjian pampasan mereka dengan Bench Win dan perjanjian jual beli mereka ('PJB') dengan Archlaw Development adalah sah dan masih berterusan. Mereka juga memohon perintah bahawa PJB dilaksanakan secara spesifik dan bahawa mereka diawardkan ganti rugi dan kos. Bench Win yang hanya kemudian mendapati bahawa plaintif-plaintif adalah setinggan-setinggan, memplid bahawa balasan untuk perjanjian pampasan adalah tidak sah dan kontrak-kontrak tersebut adalah terbatal. Archlaw Development tidak mengambil bahagian dalam perbicaraan memandangkan ia telah digulungkan dalam guaman yang berasingan dan kebenaran untuk meneruskan tindakan terhadap Archlaw Development tidak dapat diperoleh.

Diputuskan, menolak tuntutan-tuntutan dengan kos:

(1) Perjanjian pampasan antara plaintif-plaintif dan Bench Win adalah terbatal dan tidak berkuat kuasa atas dasar ketidaksahan. Memandangkan PJB adalah balasan untuk perjanjian pampasan yang mana terbatal, justeru PJB tersebut adalah tidak efektif dan tidak berkuat kuasa. Tuntutan terhadap Archlaw Development juga gagal memandangkan kebenaran mahkamah tidak dapat diperoleh di bawah s 226(3) Akta Syarikat 1965 untuk meneruskan guaman-guaman terhadapnya (lihat perenggan 23).

(2) Penggunaan premis-premis oleh plaintif-plaintif sebagai balasan, apabila mereka merupakan setinggan-setinggan yang tidak mempunyai hak dalam undang-undang dan ekuiti, adalah dihalang oleh s 425 Kanun Tanah Negara, suatu kesalahan menghuni tanah negeri dengan tidak sah. Justeru balasan yang didakwa plaintif-plaintif adalah salah di sisi undang-undang di bawah s 24(a) Akta Kontrak 1950 (lihat perenggan 22).

(3) Kuasa mahkamah untuk membuat penghakiman pengisytiharan adalah terangkum kepada perkara-perkara yang diadili dan deklarasi-deklarasi terikat yang boleh dibuat olehnya di bawah A 15 k 16 Kaedah-Kaedah Mahkamah Tinggi 1980 adalah terhad kepada hak-hak perundangan dan ekuiti tetapi bukan untuk setinggan-setinggan seperti plaintif-plaintif yang mana tidak mempunyai hak-hak sedemikian. Plaintif-plaintif juga gagal untuk membuktikan tuntutan mereka untuk ganti rugi (lihat perenggan 24).

(4) Plaintif-plaintif juga telah menandatangani perjanjian pampasan sama ada sebagai 'Licensee' atau 'sub-tenant to the Licensee'. Untuk menyatakan dan menandantangani dalam kapasiti tersebut apabila mereka tidak memilik LMS yang sah adalah penyataan jelas tentang

ketidakbenaran yang mana menjadikan representasi suatu misrepresentasi (lihat perenggan 20).]

Notes

For a case on consideration unlawful, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) para 6468.

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177, KBD (refd)
CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd [2001] 1 MLJ 511, CA (refd)
Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [11995] 3 MLJ 204; [1995] 4 CLJ 11, CA (refd)
Curtis v Chemical Cleaning and Dyeing Co Ltd [1951] 1 All ER 631,CA (refd)
Eastern Holdings Establishment of Vaduz v Singer & Friendlander Ltd [1967] 2 All ER 1192, Ch D (refd)
Fatimah v Moideen Kutty [1969] 1 MLJ 72, FC (refd)
HSBC Bank Malaysia Bhd v Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal [2004] 3 CLJ 121, CA (folld)
Ham Ho Seng & Anor v Aik-Aik Holdings Sdn Bhd & Anor and another suit [2000] 2 MLJ 60, HC (refd)
Hee Cheng v Krishnan [1955] MLJ 103 (refd)
Hong Leong Bank Berhad v Bennes Machinery Sdn Bhd & 4 Ors [2009] 1 LNS 1382, HC (refd)
Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457; [1989] 1 CLJ (Rep) 1, PC (refd)
Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh [1980] 2 MLJ 148 (refd)
Mosbert Berhad (in liquidation) v Stella D'Cruz [1985] 2 MLJ 446, SC (refd)
Ng Hee Thoong & Anor v Public Bank Berhad [1995] 1 CLJ 609, CA (refd)
Ng Kim Tin & Anor v Collector of Land Revenue Jerantut & Ors [2005] 2 CLJ 614, CA (refd)
Ooi Yoke In & Anor v Public Finance Berhad [1993] 2 CLJ 464 (refd)
Papoo v Veeriah [1965] MLJ 127 (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd [2008] 5 MLJ 191; [2008] 3 CLJ 582, CA (refd)
Sidek bin Haji Muhamad & 481 Ors v The Government of The State of Perak & Ors [1982] 1 MLJ 313; [1982] CLJ (Rep) 321, FC (refd)
Sinodaya Industrial Gas Sdn Bhd v Astrol Hoover Engineering Sdn Bhd and another appeal [2002] 3 MLJ 354, HC (folld)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)

A *YCS Corporation Bhd v Maritime Corporate Park Sdn Bhd; Northport Container Terminal Sdn Bhd & Anor (applicants)* [2009] 3 CLJ 704, HC (refd)
Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 MLJ 54; [1996] 2 CLJ 628, CA (folld)

B **Legislation referred to**
Companies Act 1948 [UK] s 231
Companies Act 1965 ss 4, 226(3), 263(2)
Companies (Winding-Up) Rules 1972 r 163
Contracts Act 1950 ss 2(d), 18, 19, 24(a), (b), 25
C National Land Code ss 5, 68, 425, 425(1)(a)
Rules of the High Court 1980 O 15 r 16

Gooi Hsiao Leong (Gooi & Associates) for the plaintiff.
Neoh Hor Kee (Marcia Lopez with him) (BC Teh & Yeoh) for the defendant.
Hanizah bt Hassan (Insolvency Department of Penang) for the other party.
D

Chew Soo Ho JC:

E BRIEF FACTS

[1] All the plaintiffs were the occupiers of a premises known as No 117 N, Jalan Tengku, Jelutong Timur, 11600 Georgetown, Penang ('the said
F premises') which was built on the state land.

[2] The first defendant was a housing developer and wanted to build an access road through the state land where the said premises stood in order to gain access to the land of its housing project.

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[3] The plaintiff alleged that in order to do so, the first defendant had offered to compensate them to vacate the said premises and to allow their premises to be demolished. The first defendant averred conversely that the plaintiffs had warranted that they were the licensees or owner/occupiers or subtenant of the
H licensee of the said premises and upon this representation that the first defendant entered into the three compensation agreements dated 21 March 1997 with the respective plaintiffs. These compensation agreements provide that the plaintiffs were to deliver vacant possession of the premises to the first defendant and in consideration thereof, the second defendant was to deliver
I one free unit and two discounted units of apartment in a housing project known as Desa Jelita Phase 1 to the plaintiffs ie with consideration moved from the second defendant. Upon a notification from the second defendant dated 11 June 2002 to the plaintiffs that the compensation units of apartment were ready to be delivered, the plaintiffs had vacated the premises.

[4] The housing project which the first defendant intended to develop which necessitated that access road through the state land where the said premises was, could not be proceeded on when the chargee bank refused consent for subdivision resulting in the building plans for the said project to lapse. As a consequence, the first defendant did not require to build the said access road and did not need vacant possession of the premises from the plaintiffs. For that reason, the first defendant issued a notice of rescission dated 26 September 2003 to terminate the compensation agreements with the plaintiffs. Therefore, the plaintiffs filed their respective claims for a declaration that the compensation agreements with the first defendant dated 21 March1997 and the sale and purchase agreements with the second defendant dated 2 April 1997 to be valid, subsisting and enforceable, an order for specific performance of the sale and purchase agreements dated 2 April 1997 that the second defendant be directed to deliver vacant possession of the said units, general damages and costs.

[5] The first defendant averred that it subsequently discovered that the premises was built on the state land by the plaintiffs late father who was given a Temporary Occupation Licence ('TOL'). However, the TOL was ultimately cancelled on 20 January 1984 but it was continued to be occupied without the consent or approval from the state. The plaintiffs' father had later passed away in 1992. Hence the first defendant pleaded that the plaintiffs' consideration for the compensation agreement was illegal and the contracts were void.

[6] The second defendant has been wound up vide Penang High Court Companies Winding Up Case No 28–123–10 of 2011 on 4 January 2012 and no leave had been obtained to proceed against the second defendant at the date of the trial.

THE ISSUES

[7] The principal issue before this court upon the facts of these cases is whether the compensation agreements entered into between the respective plaintiffs and the first defendant and the S&P agreements being the consideration for the said compensation agreements provided by the second defendant are illegal and void ab initio.

[8] Although the first defendant had also pleaded frustration of contract, misrepresentation and/or mistake no particular emphasis has been placed on them except misrepresentation and I do not find it necessary to consider them as separate issues but will consider them along with the principal issue of illegality if the need arises.

ORAL APPLICATION FOR LEAVE TO PROCEED AGAINST THE SECOND DEFENDANT PURSUANT TO S 226 (3) COMPANIES ACT 1965 ('ACT 125')

[9] At the commencement of this trial on 27 February 2012, it came to light that the plaintiffs have not obtained leave of court to proceed with the case against the second defendant which had been wound up vide an order of court dated 4 January 2012 at Penang High Court in Company Winding Up No 28–123–10 of 2011 (bundle B pp 75–76) with the Official Receiver Malaysia being appointed as liquidator of the second defendant. Consequent upon this order dated 4 January 2012, learned counsel for the defendants had applied to be discharged from acting for the second defendant in January 2012 itself and the plaintiffs' solicitors have been duly informed. However, no action had been taken to apply for the requisite leave pursuant to s 226(3) of the Companies Act 1965.

[10] Learned counsel for the plaintiff attempted to seek an adjournment to enable him to apply for such leave on ground that it was an oversight that leave was not applied for, to the vehement objection by learned counsel for the first defendant. This court had however refused the application for adjournment on ground that this case is a long overdue case of six years since 2006 and that there is no excuse for the plaintiffs not to take any action knowing the fact that the hearing dates had been scheduled on 27–28 February 2012 which was one month away from being informed of the said winding up and the discharge of the solicitor acting for the second defendant. Nevertheless, this court stood down the case for learned counsel for the plaintiffs to resolve the matter. When the case was recalled at 11am after having waited for learned counsel for the plaintiffs who had gone to the official receiver's office, he made an oral application for leave from this court under ss 263(2) and 226(3) of the Companies Act 1965 citing the case of *Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd* [2008] 5 MLJ 191; [2008] 3 CLJ 582 where the Court of Appeal reiterated the guiding principle for the court to grant leave under s 263(2) of the Companies Act 1965 as adopted by the Supreme Court in *Mosbert Berhad (in liquidation) v Stella D'Cruz* [1985] 2 MLJ 446 that 'the court will always give an application for leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings'. Since the plaintiffs are claiming for a declaration which the liquidator does not have the power to grant, the plaintiffs submitted that they should be granted leave to pursue this claim. Meanwhile, having just been informed, the officer from the insolvency department appeared in court at 11.10am but Cik Siti Noraina who appeared for the official receiver informed this court that the official receiver had no knowledge of this case and added that the plaintiffs must obtain leave from the winding up court under s 226(3) of the Companies Act 1965 but not from this trial court before they could

proceed against the second defendant. Learned counsel for the first defendant had also strenuously objected to such an oral application which took the first defendant by surprise. He distinguished the *Shencourt*'s case that it was an appeal against the order of the winding up court. It contended that application cannot be made orally and all the most before a trial court; such application at the late stage of trial was prejudicial to the defendant. Learned counsel for the plaintiffs persisted that the trial court could consider the oral application. This court then deferred the application for parties to submit further with their authorities. Meantime, the trial was proceeded on and it was concluded on the same day. Upon request by both parties, submission was adjourned to 2 March 2012.

[11] On 2 March 2012, learned counsel for the plaintiffs merely submitted relying on the definition of the word 'court' under s 4 of the Companies Act 1965 where 'Court' means the High Court or a judge thereof and a case where the application for leave was by way of originating summons ('OS') which I find to be clearly distinguishable since here it is a case of an oral application and not by OS supported by an affidavit. Learned counsel for the first defendant had tendered a written submission on this application to submit, inter alia, that the trial court has no jurisdiction to grant such leave and it is the winding up court which should have that jurisdiction even though both are essentially entities of co-ordinating jurisdiction citing *Eastern Holdings Establishment of Vaduz v Singer & Friendlander Ltd* [1967] 2 All ER 1192 where in ascribing the meaning of 'court' within s 231 of the English Companies Act 1948 which is in pari materia with our s 226(3) of the Companies Act 1965, Buckley J had defined 'The Court' to mean the court having jurisdiction to wind up the company, that is to say, the Companies' Court, not the Chancery Division of the High Court. Other authorities cited in support are *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [11995] 3 MLJ 204; [1995] 4 CLJ 11 (CA); *YCS Corporation Bhd v Maritime Corporate Park Sdn Bhd; Northport Container Terminal Sdn Bhd & Anor (applicants)* [2009] 3 CLJ 704. The representative of the official receiver's office who appeared on this date of submission had submitted two authorities which are on same point that the application should be made to the court that granted the winding up order; they are *Ham Ho Seng & Anor v Aik-Aik Holdings Sdn Bhd & Anor and another suit* [2000] 2 MLJ 60 and *CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd* [2001] 1 MLJ 511 (CA). In *Ham Ho Seng*'s case, His Lordship Clement Skinner JC (now JCA) held the view that s 226(3) of the Companies Act 1965 should not be read in isolation but should be read together with other provisions of the law relevant to the winding up of a company such as r 163 of the Companies (Winding-Up) Rules 1972 which empowers the judge who granted the winding up order 'to order the transfer to him of any action, cause or matter pending brought or continued by or against the company'. I wish to add that the trial judge hearing the suit not being the judge who granted the winding up

order would have no such power to do so. In *CGU Insurance Bhd*'s case, the Court of Appeal has held, inter alia, that:

> … One of them is restriction imposed by s 226(3) of the Act whereby a party must obtain leave from the winding up court to proceed with the appeal against a company which has been wound up … Since the appellant had failed to comply with the requirement of s 226(3) of the Act, the notice of appeal was struck off.

[12] Following the authorities which have clearly shown that 'the court' within 226(3) and indeed s 263(2) of the Companies Act 1965 should refer to the winding up court, I must say that it is a wrong process for the plaintiffs to apply orally for such leave from this court which is not the winding up court that had granted the winding up order dated 4 January 2012. Section 263(2) is a mandatory provision that:

> 263
>
> (1) …
>
> (2) After the commencement of the winding up no action shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

[13] Without the leave of the winding up court, the plaintiffs therefore cannot proceed with or commence this suit against the second defendant.

[14] It was further submitted by the first defendant that there was in fact no merit in this leave application as there was no sworn materials before the court of any ground for this court to consider citing *HSBC Bank Malaysia Bhd v Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121 (CA); *Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54; [1996] 2 CLJ 628 (CA). It was merely an assertion by learned counsel from the Bar table that it was due to an oversight which amounts to tendering oral evidence from the Bar and must be rejected citing *Sinodaya Industrial Gas Sdn Bhd v Astrol Hoover Engineering Sdn Bhd and another appeal* [2002] 3 MLJ 354.

[15] I agree with this submission. Material facts leading to the grounds in support of an application ought to be in the form of an affidavit without which any submission advancing such grounds by counsel would tantamount to counsel giving evidence from the Bar which must be deprecated; see *Ng Hee Thoong & Anor v Public Bank Berhad* [1995] 1 CLJ 609 at p 615 (CA). I find no valid reason before me to consider this application even if this court were to have the jurisdiction and power to do so. I do not find the bare assertion by learned counsel for the plaintiffs to be a valid ground at all.

[16] For the foregoing reasons, I dismissed the oral application accordingly. A

EVALUATION AND FINDINGS

[17] The facts of the case are not disputed by the parties herein that the plaintiffs were the occupiers of the said premises erected on the state land for which TOL issued to the late father of the plaintiffs had been cancelled ultimately on 20 January 1984. It is also undisputed that the plaintiffs' father, at one time licensee of that part of the state land where the premises stood, had passed away in 1992. The first defendant in wanting to build an access road through the said state land leading to the land of its development, had entered into compensation agreements on 21 March 1997 with the plaintiffs for the vacant possession of the said premises and that part of the land where it was erected on. These three compensation agreements are as shown in bundle B pp 1–7, 8–14 and 15–21 respectively as agreed documents between the plaintiffs and the first defendant. Since no leave has been obtained to proceed against the second defendant, I shall disregard the role and involvement of the second defendant. B C D

[18] The plaintiffs alleged that it was the first defendant who had approached them to vacate the said premises and in consideration thereof to provide them with compensation of one free unit and two other units of apartment at the project known as Desa Jelita Phase 1, at a discounted price for which the plaintiffs had accepted and had performed their part of obligations but the first defendant had rescinded the said compensation agreements on ground that the charge bank had refused consent for subdivision and that had resulted in the building plans of the first defendant's project to have lapsed. The plaintiffs submitted that the defence of misrepresentation which was only raised for the first time in the statement of defence was an afterthought as the legal status of the plaintiffs' occupation of the state land was never material to the first defendant when the compensation agreements were entered into. I must pause to say that the defence is entitled to plead such a defence when material facts have come to light that there was such misrepresentation at the material time of entering into the said agreements. It was contended also by the plaintiffs that the terms 'licensees' and/or 'sub-tenants of the licensees' were mere descriptions used to refer to the plaintiffs in the compensation agreements which were prepared by the first defendant without any clause warranting that the plaintiffs were lawfully occupying the said premises or that parts of the state land nor did the plaintiffs represent that they were holders of any TOL granted by the state authority. On the oral evidence, the plaintiffs submitted that there was no evidence to show that the plaintiffs had made such representations. Pertaining to the defence of illegality, learned counsel for the plaintiffs submitted that the first defendant had misconstrued the law in its contention. He referred to s 24(a)–(b) of the Contracts Act 1950 to submit that E F G H I

there is nothing illegal of the consideration or object of the compensation agreement because the object and purpose of the contract was merely to vacate and demolish the said premises and not to perpetuate or to further any unlawful occupation of the state land notwithstanding that the plaintiffs may well be squatters on the state land. It was further submitted that the first defendant had failed to prove that the contract was entered into with the object of committing an illegal act or that the contract was one which was expressly or impliedly prohibited by statute.

[19] The first defendant in brief had submitted that the representations of the plaintiffs being licensee or subtenant of the licensee were found in the written compensation agreements respectively which presupposed that the plaintiffs were in possession of a valid licence to occupy the state land. Relying on those representations, the first defendant had entered into the compensation agreements with the plaintiffs. It was however discovered that the TOL, granted to the plaintiffs' late father had been cancelled twice ie on 1 January 1972 and ultimately on 20 January 1984 but the plaintiffs' late father continued to occupy the said premises on the state land and subsequently the plaintiffs also continued to do so without the consent and approval from the state. The plaintiffs therefore were squatters who had no right over the said premises on the state land pursuant to the definition of 'land' under s 5 of the National Code ('NLC') which states that:

> 'Land' includes … all things attached to the earth or permanently fastened to anything attached to the earth, whether on or below the surface.,

and the authority of *Papoo v Veeriah* [1965] MLJ 127 which held that building erected on state land which was subject of a temporary occupation licence cannot be the subject of private transactions if the state was not a party because such buildings were clearly the property of the state. Hence, the first defendant submitted that the plaintiffs' consideration was illegal and/or premised upon a non-existent consideration. In addition, the first defendant contended that the plaintiffs as squatters and/or trespassers onto the state land would have no rights whatsoever over any part of the state land and the said premises.

[20] I shall first deal with the question of representations by the plaintiffs that they were licensees and/or tenants of the licensee. These representations did not come from oral evidence of any witness but from the compensation agreements themselves which clearly printed the words 'licensee' (bundle B pp 2 and 4–5) which referred to the first and second plaintiff in CS 22–129 of 2006 and they also signed as licensee; the word 'subtenant of the licensee' (bundle B pp 9 and 11–12) which referred to the plaintiff Yeoh Theam Kheng in CS 22–130 of 2006 and he too signed as subtenant of the licensee; and similarly in the case of the plaintiff Yeoh Theam Wai in CS 22–131 of 2006, he contracted as 'sub-tenant of the Licensee' and signed in that capacity (bundle B

pp 16 and 18–19). The signatures of the plaintiffs which they do not deny were their assent to the contents of the compensation agreements irrespective whether who prepared those agreements; see *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 All ER 631; *Ooi Yoke In & Anor v Public Finance Berhad* [1993] 2 CLJ 464; *Hong Leong Bank Berhad v Bennes Machinery Sdn Bhd & 4 Ors* [2009] 1 LNS 1382. The plaintiffs therefore cannot be blowing hot and cold on the one hand seeking to enforce the compensation agreements contending that they are valid and enforceable and on the other hand alleging that the contents which described them as 'Licensee' or 'sub-tenant of the Licensee' were not true or were not what they had represented although they had so signed in the respective capacity before an advocate and solicitor. Construing what had been represented in the compensation agreements, 'Licensee' of a state land could only mean that the plaintiffs must have the TOL which vested in them the right and consent of the state to occupy the said portion of the state land. The subtenant of the licensee would mean that he was clothed with that right of occupation as the licensee was so licensed and had consented to allow the subtenant to occupy that part of the state land for which TOL was granted. That was exactly the representation portrayed in the compensation agreements which the plaintiffs had signed in those respective capacity as 'Licensee' or 'subtenant to the Licensee'. To assert and sign as 'Licensee' or 'sub-tenants to the Licensee' when the plaintiffs did not possess a valid TOL is a clear assertion of untruth which makes the representations a misrepresentation; see s 18 of the Contracts Act 1950 ('Act 136'). Pursuant to s 19 of the Contracts Act 1950, when consent to an agreement is caused by misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. The first defendant could certainly rescind the contracts on this ground but apparently that was not the ground relied upon. Such misrepresentation is nevertheless adverse to the plaintiffs to show that they do not come to court with clean hands. The more pertinent issue to determine this case is the defence's allegation of illegality which will vitiate the contracts between the parties herein and render them void. The plaintiffs by their submissions had indirectly admitted that they had no TOL to vest in them the right to occupy the said premises on the state land and they were squatters. In *Hee Cheng v Krishnan* [1955] MLJ 103 where the plaintiff claimed for specific performance or alternatively for damages for a breach of contract for the purchase of a house built upon a land which a TOL was issued, Thomson J (as His Lordship then was) held that the plaintiff's claim must fail as it was an attempt to sell and purchase the defendant's rights under the TOL which was unlawful by reason of s 24 of the Contracts Ordinance (Act 136 now) as being of such a nature that if permitted it would defeat the provisions of any law that it is therefore void. This was because the TOL was issued under reg 40 of the Land Rules 1930 and by r 41, 'No licence for temporary occupation of State land shall be transferable' which was the provision of the law which would be defeated if effect were given to a contract of the nature. I quoted this case to show that even a party with TOL could not transact with his

rights to occupy or use acquired therefrom, what more the plaintiffs who had no such licence to occupy at all. In the cited case of *Fatimah v Moideen Kutty* [1969] 1 MLJ 72 (FC), Suffian FJ (as His Lordship then was) expressed the view that TOL by law was not transferable neither had the widow or the estate of the deceased licensee any right of any kind whatsoever to the land which remained state land after the issuance of TOL. This is in line with s 68 of the NLC which provides that every TOL shall terminate on the death of the licensee. The other authority cited by learned counsel for the first defendant which is relevant is *Ng Kim Tin & Anor v Collector of Land Revenue Jerantut & Ors* [2005] 2 CLJ 614 where His Lordship Abdul Kadir Sulaiman JCA stated that when the plaintiffs were no longer the holder of a valid TOL which had expired, they were on the state land carrying out activities on the land illegally as they were no longer persons entitled to possession of the land and could not have instituted an action for trespass against the respondent. His Lordship added that 'without having a licence to occupy, the plaintiffs remained on the land as a trespasser. There is therefore nothing to vary as to the conditions of land use because as of that date (referring to date when the TOL had expired) the land belongs to the state and no longer in legal occupation of the plaintiffs'. The position in the instant case is similar; when the TOL had been cancelled on 20 January 1984 ultimately, the continued occupation of the said premises and the state land without having a licence to occupy would make the plaintiffs trespassers as their continued occupation was illegal. To allow the plaintiffs to enter into any legal transaction over the said premises on the state land would undoubtedly tantamounting to recognising the plaintiffs' consideration as lawful which is indeed unlawful under s 24(a)–(b) of the Contracts Act 1950 which provides:

> 24 The consideration or object of an agreement is lawful, unless —
>
> (a) It is forbidden by a law;
>
> (b) It is of such a nature that, if permitted, it would defeat any law;
>
> …

[21] The said premises on the state land after the termination of the TOL become property of the state and could not therefore be used by the plaintiffs as a valid consideration when the state authority was not a party. To permit the plaintiffs to use the state property as consideration would be to perpetrate an illegal act or fraud calculated to deceive the party to the contract without the state having given their consent for that said premises and land thereon to be so used by the plaintiffs; see s 2(d) of the Contracts Act 1950. This illegal act or fraud must be frowned at by this court. As can be seen from the authorities of *Hee Cheng v Krishnan* and *Papoo v Veeriah*, even in cases where the building erected on the state land which is the subject of a TOL cannot be the subject of a private transaction if the state is not a party. All the most, the plaintiffs who did not possess even such a licence to occupy, can be said as contended by

learned counsel for the plaintiffs, to have such right to provide the lawful consideration. It is preposterous and misconceived on the face of clear law. The Federal Court in the cited case of *Sidek bin Haji Muhamad & 481 Ors v The Government of The State of Perak & Ors* [1982] 1 MLJ 313; [1982] CLJ (Rep) 321 had made it abundantly clear on the status of squatters when it held as follows:

Held:

(1) It is clear beyond doubt that the appellants cannot succeed in their action because they are squatters. Squatters have no right either in law or in equity. It does not lie in their mouths to assert that they used and occupied the land as squatters.

(2) Squatters go into possession by or as a result of illegal occupation of state land. Illegal occupation of state land is an offence under s 425 of the National Land Code. It is well established that a court of equity will never assist squatters to resist an order of possession illegally acquired; it will never intervene in aid of wrong-doers. What equitable right or interest can be conjured up for the squatters who have illegally occupied state land?

…

[22] The plaintiffs' use of the said premises erected on the state land as consideration when they were squatters who have no right either in law or in equity is certainly forbidden by s 425 of the NLC, an offence for illegal occupation of state land. Thus, the plaintiffs' alleged consideration is unlawful under s 24(a) of the Contracts Act 1950. An unlawful or illegal occupation of state land which is a crime under s 425(1)(a) of the NLC can certainly not use vacant possession ancillary to such unlawful or illegal occupation as a valid consideration to enter into a contract. It will render s 425(1)(a) of the NLC nugatory if that is allowed. As the consideration is unlawful, pursuant to s 25 of the Contracts Act 1950, the compensation agreements between the plaintiffs and the first defendant are void and thus unenforceable. No court could knowingly be a party to the enforcement of an unlawful and void agreement; see *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; [1989] 1 CLJ (Rep) 1 (PC).

CONCLUSION

[23] For the foregoing reasons, I hold that the compensation agreements entered into between the plaintiffs and the first defendant are void and unenforceable on ground of illegality. Since the sales and purchase agreements between the plaintiffs and the second defendant were consideration for the said compensation agreements which are void, the sale and purchase agreements being consideration for a void contract/agreement are thus ineffective and unenforceable. In any event, in the absence of leave of court to proceed on

those cases against the second defendant pursuant to s 226(3) of the Companies Act 1965, the plaintiffs' claim against the second defendant must also fail.

[24] As to the declaration sought by the plaintiffs and damages, I find no necessity to deliberate them upon the above findings save to say that I agree with the submission by the first defendant that the court's power to make declaratory judgments is confined to matters justifiable in the courts and the binding declarations it can make under O 15 r 16 of the Rules of the High Court 1980 are limited to legal and equitable rights, inter alia, (see *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148 at p 153) but not to squatters as the plaintiffs who did not have any legal and equitable right. Damages are not proved by the plaintiffs as no evidence had been led to that effect. It is axiomatic that the plaintiffs seeking to claim damages must prove the fact and the amount of damages; see *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360. The often quotes words by Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177, p 178 must be borne in mind and they are:

> … plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

See *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15.

[25] Having considering all evidence and submissions by both the plaintiffs and the first defendant, I hold that the plaintiffs have failed to prove their case on a balance of probabilities and I therefore dismiss the plaintiffs' claims with costs of RM15,000 in respect of all three cases.

Claims dismissed with costs.

Reported by Ashok Kumar